No. 84-6811 (13)

IN THE
SUPREME COURT OF THE UNITED [illegible]86

October Term, 1986

WARREN McCLESKEY,

Petitioner,

vs.

RALPH M. KEMP, Superintendent,
Georgia Diagnostic and
Classification Center,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Brief of Amici Curiae State of California, by John K. Van de Kamp, Attorney General, and County of Los Angeles, by Ira Reiner, District Attorney, In Support of Respondent

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Miscellaneous

Amici curiae, the State of California by John K. Van de Kamp, Attorney General, and the County of Los Angeles (a political subdivision of the State of California), by Ira Reiner, District Attorney, submit this brief in support of respondent pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI CURIAE

John K. Van De Kamp, Attorney General for the State of California and Ira Reiner, District Attorney for the County of Los Angeles, State of California, jointly represent the People of the State of California in the case of In re Earl Lloyd Jackson, Crim. 22165, pending before the California Supreme Court on petition for writ of habeas corpus. Said case is pending before a referee appointed by the California Supreme Court to take evidence on three issues, one of which is highly

pertinent to the instant case: Whether "death sentences in California have been discriminatorily imposed on the basis of (1) the race of the victim; (2) the race of the defendant; and/or (3) the gender of the defendant."[1/] Amici curiae have been litigating just the discovery aspect of this case for over two years. This order for a reference hearing was granted on the basis of a statistical analysis of limited data on death and life-without-possibility-of-parole cases. It is the theory of the defense in Jackson that a statistical analysis of death and life-without-possibility-of parole cases will show that persons who kill white victims,

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1. All of the factual representations made in this brief are based upon matters set forth in the record as well as the personal experiences of the government attorneys who have litigated, before the California Supreme Court and its appointed referee, the petition for writ of habeas corpus in the Jackson case.

and male, black defendants are more likely to be charged with and to receive the death penalty because o these unconstitutional racial/gender factors than are persons in other racial/gender categories.

Defendant Jackson, who is black, was charged with murdering two elderly white women in two separate burglaries of their residences in August and September 1977.[2/] These charges made him eligible for the death penalty pursuant to California Penal Code section 190 et seq.[3/] After a jury

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2. The race of defendant Jackson as well as the race of his two victims are not alleged or referred to in the Information.

3. The law under which Jackson was convicted and sentenced (Stats. 1977, Ch. 316), enacted August 11, 1977, requires that one or more "special circumstances" be alleged and found true by the trier of fact before capital punishment may be imposed. This law was repealed, and essentially reenacted as modified, by the "Briggs Initiative", passed by the voters and effective November 7, 1978, principally to expand the number of special circumstances making a person eligible for capital punishment.

verdict finding him guilty as charged and imposing the death penalty, a judgment was rendered in March 1979, sentencing him to death. On his automatic appeal to the California Supreme Court, the judgment was affirmed and a concurrent petition for writ of habeas corpus was denied. People v. Jackson, 28 Cal.3d 264 (1980). The law under which defendant Jackson was sentenced has been held constitutional on its face by this Court and the California Supreme Court. Pulley v. Harris, 465 U.S. 37 (1984); People v. Frierson, 25 Cal.3d 142, 192-195 (1979).

Defendant Jackson filed a subsequent petition for writ of habeas corpus, which is the basis for the reference hearing ordered by the California Supreme Court. That court first ordered the reference hearing to address two unrelated issues.

Defendant Jackson then moved to expand the reference hearing on the theory that a statistical analysis of capital case data showed evidence of race and gender discrimination in violation of the Eighth and Fourteenth Amendments to the Federal Constitution.

In support of his application, he offered inter alia the declaration of Dr. James Cole, Ph.D., a statistician, who analyzed race and gender homicide data published annually by the Bureau of Criminal Statistics, a division of the State Attorney General's Office, and data supplied by the State Public Defender's Office. Using a total of three variables (victim race, defendant race, defendant sex) for all state-wide homicides, all state-wide robbery murders, and all robbery-murders in Los Angeles County, in various combinations of what is princi-

pally a cross tabulation analysis, Dr. Cole concluded, without reference to other circumstances of any cases, that killers of white victims are five times more likely to receive the death penalty than killers of non-white victims. Similar proportions were found for black defendants when compared to other groups.

On this basis, the reference hearing was ordered expanded to address the issue of whether death sentences in California have been discriminatorily imposed on the basis of race of victim, race of defendant, or gender of defendant.

Subsequently, defendant Jackson moved for discovery of a virtual mountain of statewide homicide data. Jackson requested and was granted an order compelling the District Attorney of Los Angeles County to provide this data, even though most of the data is a matter of

public record, located outside the jurisdiction of Los Angeles County.[4/]

To comply with this order, amici subpoenaed homicide data from all of the Superior Court Clerks in the 58 counties throughout the State as well as other entities such as the Administrative Office of the Court. Because of the complex nature of the task of obtaining even limited data from the Clerks, and because not one single Clerk's Office maintains such data on computers, the process of obtaining the data was time-consuming and expensive. Clerks' records in literally thousands of cases had to be individually identified, categorized and reviewed to

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4. For a more detailed exposition of the order and what followed, the Court is respectfully referred to Argument I of the Brief of Amici Curiae, State of California and County of Los Angeles, filed in the case of Hitchcock v. Wainwright, No. 85-6756, now pending before this Court on Writ of Certiorari.

obtain the required data. When, after six months, this effort by several lawyers and numerous Court Clerks and their staffs was completed, the product of this effort was found to be highly questionable in terms of its quality. For example, some categories of data by the Los Angeles County Clerk's Office are subject to a 50% plus error rate and there is reason to believe that data submitted by other Clerks from throughout the State may also be subject to error.

The discovery process itself heightens the interest of amici in the instant case. Data gathering must take place before a statistical challenge to the death penalty can be mounted. The fact that the data gathering process may differ from one jurisdiction to another, and the fact that it may occur in the absence of a court order, as in the instant case, are

not significant. Regardless of who gathers the data, it will be a time-consuming, expensive process. This, in turn, causes inordinate delay in the judicial process. The quality of the product of discovery (the data) may be highly questionable. It may, as in Jackson, be subject to significant error. More importantly, as we set forth in Argument II, infra, a capital case cannot be reduced to statistical data which accurately reflects how and why the jury reached its decision.

Since the issues presented in the instant case are so closely related to those of the Jackson case, amici curiae have concluded that the outcome of the instant case will have a substantial impact upon the administration of criminal justice, and the death penalty law in particular, throughout California.

Amici's experience in the Jackson case has made us familiar with the nature of the discrimination issues and the arguments offered by petitioner in this case.

SUMMARY OF ARGUMENT

When a state imposes its death penalty under a constitutional system which by its very design minimizes any risk of arbitrariness, generalized claims of arbitrariness in the imposition of that state's death penalty should be foreclosed. Only a particularized and factually supported claim of purposeful invidious discrimination in the imposition of petitioner's own death sentence should have entitled petitioner to a hearing.

The nature of the decision-making process in a constitutionally valid capital-sentencing system justifies requiring more than the evidence of disparate impact proffered by petitioner to

establish a prima facie case of purposeful invidious race discrimination. This decision-making process is distinctly different from other decision-making contexts in that it is more complex and it contains many more safeguards against purposeful discrimination. Thus, only evidence of a stark pattern could ever suffice to demonstrate a prima facie case of discrimination in the imposition of the death penalty.

Moreover, such a stark pattern of race discrimination can never be demonstrated through the use of a statistical analysis, no matter how sophisticated the methodology. Each case is unique, involving its own quantum of variables, which are not comparable to any other set of variables. The factors found in the evidence which move a jury to impose capital punishment, even when identified,

are impossible to measure accurately. Thus, no statistical analysis of capital eligible cases will yield a valid result.

Finally, petitioner's argument, when reduced to its essence, is an assault upon the judicial system itself, for it postulates that no jury's decision can ever be trusted unless it passes the litmus test of a statistical analysis. This proposition is unacceptable as a matter of constitutional law.[5/]

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5. Petitioner cites many articles from law reviews and other treatises to demonstrate that study after study has found evidence of race discrimination in the imposition of the death penalty specifically, and in sentencing generally, in Georgia and other states in the South. Neither time nor space permits us the luxury of answering the contentions made in these many articles. However, a recent, objective review of some of these studies and their conclusion may be found in Kleck, Life Support for Ailing Hypotheses: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing, 9 Law and Human Behavior, at 271 (1985).

ARGUMENT

I

THE NATURE OF THE DECISION-MAKING PROCESS IN A CONSTITUTIONAL CAPITAL SENTENCING SYSTEM JUSTIFIES REQUIRING MORE THAN THE LEVEL OF DISPARATE IMPACT PROFFERED BY PETITIONER TO ESTABLISH A PRIMA FACIE CASE OF PURPOSEFUL INVIDIOUS DISCRIMINATION IN THE IMPOSITION OF THE DEATH PENALTY

Petitioner contends that he presented a prima facie case of discrimination in the imposition of the death penalty in Georgia, that his proof was unrebutted and that it was sufficient to support a finding that Georgia's entire capital sentencing system has been unconstitutionally applied in violation of the Eighth and Fourteenth Amendments on the basis of the race of the victim. Amici curiae urge that petitioner's proof consisted, at most, of little more than a relatively small pattern of disparate

impact which was legally insufficient to constitute a prima facie case of discrimination, much less to support a finding that Georgia's entire facially constitutional capital sentencing system has been applied unconstitutionally.

The essence of petitioner's submission is that the minimal standards required to prove racial discrimination in the context of job promotion or selection of a jury should apply in the context of capital sentencing. Brief for Petitioner at 31-32. Amici curiae urge that such minimal standards should not apply to proof of racial discrimination in the capital sentencing context. As we shall demonstrate, given the nature of the decision-making process in a constitutional capital sentencing system, the general rule should be followed that, when proof of disparate impact alone is

offered, only "a pattern as stark as that in Gomillion [6] or Yick Wo" [7] will be determinative on the issue of purposeful invidious discrimination. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 and fn. 13 (1977).

Whenever governmental action is claimed to be racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment, the "invidious quality" of that action "must ultimately be traced to a racially

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6. In Gomillion v. Lightfoot, 364 U.S. 339 (1960), a state redefined a city's boundaries in such a manner that the formerly square-shaped city became a 28-sided city with the result that all but four or five of 400 black voters were disenfranchised while no white voters were.

7. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), a city administered an ordinance in such a manner that permission to operate a laundry was denied to all 200 Chinese who sought permission during the same time period that such permission was granted to 80 non-Chinese.

discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976). The burden of proof is on the claimant and the showing required of the claimant to establish a prima facie case of purposeful invidious discrimination depends on the context in which the claim arose. See Batson v. Kentucky, ___ U.S. ___, ___, 90 L.Ed.2d 69, 85-87 (1986); Wayte v. United States, ___ U.S. ___, ___, 84 L.Ed.2d 547, 556-557 and fn. 10 (1985); Washington v. Davis, supra, 426 U.S. at 253 (Stevens, J. concurring).

The general rule is that unless there is a "pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative." Arlington Heights v. Metropolitan Housing Corp., supra, 429 U.S. at 266. In some exceptional contexts, proof of a less than stark pattern of disparate impact may demonstrate

purposeful racial discrimination because the very nature of the disputed decision-making task itself makes a racially disparate impact unexplainable except on racial grounds. For example, "[p]roof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.' [Citations.]" Batson v. Kentucky, supra, 90 L.Ed.2d at 86; see also Washington v. Davis, supra, 426 U.S. at 238-245. "But such cases are rare" (Arlington Heights v. Metropolitan Housing Corp., supra, 429 U.S. at 266), and important distinction may be drawn to separate them from those in which the general rule applies.[8/]

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8. Whether petitioner's claim is presented in terms of an Eighth Amendment cruel and unusual punishment concern or in terms of a Fourteenth Amendment equal protection concern, the basic thrust of his claim is the same: governmental action

A. The Strict Procedural Safeguards Built Into the Capital Sentencing Process Justify Applying the General Rule That Disparate Impact Alone Is Insufficient to Support a Claim of Discrimination

The decision-making process in the imposition of the death penalty is unique. Unlike any other decision-making process (such as in selecting the venire, or hiring or promoting employees or selling or renting a home, or drawing city voting boundaries, or issuing permits for laundries), the decision-making process involved in the imposition of the death penalty is replete with built-in procedural safeguards against purposeful invidious discrimination on the part of the decision makers. First, a constitutional capital sentencing system

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has impacted in an invidiously discriminatory manner on a group of which he is a member. Thus, no matter how his claim is clothed, petitioner should be required to prove purposeful invidious discrimination.

itself is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 179 (1976). A constitutional capital sentencing system "can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984). Additionally, as a criminal defendant, the capital defendant is entitled to insist that both the venire, from which the decision-making petit jury will be drawn, and the decision-making petit jury itself are selected pursuant to non-discriminatory criteria. Even the historically unfettered exercise of the peremptory challenge is restricted (for the prosecution at least), and the defendant may question at trial the peremptory exclusion of veniremen from the petit jury

on account of their race. Batson v. Kentucky, supra, ___ U.S. at ___; 90 L.Ed.2d at 87. As an added precaution against purposeful invidious racial discrimination on the part of the decision makers, a capital defendant is entitled to have prospective jurors questioned on the issue of racial bias if there is a risk of racial prejudice infecting the sentencing proceeding. Turner v. Murray, ___ U.S. ___, ___; 90 L.Ed.2d 27, 37 (1986). These are but a sampling of the panoply of safeguards protecting the capital sentencing decision-making process.

The procedural safeguards against purposeful invidious discrimination which are an integral part of the capital sentencing decision-making process readily distinguish that process from the job promotion and jury selection decision-making processes. In those processes

there are no comparable built-in safeguards against purposeful invidious discrimination on the part of the decision makers. Thus, an examination of their decisions cannot begin with the same confidence. The safeguards present in capital sentencing justify applying the general rule that disparate impact alone will not establish a prima facie case of purposeful invidious discrimination unless, as the Court of Appeals held in the case below, the "disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful [racial] discrimination . . . can be presumed to permeate the system." McCleskey v. Kemp, 753 F.2d 877, 892 (11th Cir. 1985).[9/]

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9. Contrary to petitioner's contention that the Court of Appeals "fashioned unprecedented standards of proof" and

The Court has previously recognized and applied the principles underlying this conclusion in Pulley v. Harris, supra, 465 U.S. at 51-54. Therein, the Court addressed the issue whether mandatory comparative proportionality review was an essential element of a constitutional capital sentencing system. The Court found it was not, if the capital sentencing system already had in place other extensive procedural safeguards against arbitrariness. Clearly, if a system's in-place procedural safeguards against arbitrariness are factors to be considered in determining whether other such safeguards will be required, a fortiori, a system's in-place procedural

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"announced the abolition of the prima facie standard," the Court of Appeals in the case below merely restated this Court's general rule concerning proffers of disparate impact evidence. See Brief of Petitioner at 45, 62.

safeguards against purposeful invidious discrimination are also factors to be considered in determining what standard of proof should be applied to claims of discrimination within that system.

B. **The Number, Complexity and Subjectivity of Factors Considered in Capital Sentencing Make Evidence of Disparate Impact Alone Insufficient**

In addition to the built-in procedural safeguards which distinguish the capital sentencing decision-making process from other decision-making processes, the greater number, complexity, subjectivity, and interactivity of factors legitimately affecting the capital sentencing decisions further distinguish the capital sentencing decision-making process from others. Likewise, this difference also justifies applying the general rule, in claims of capital sentencing discrimination, that proof of disparate impact which reflects

anything less than a stark pattern will not establish a prima facie case of purposeful invidious discrimination.

There are comparatively few factors which can legitimately affect the decisions whether to select a person to be a part of the venire or a grand jury or whether to hire an applicant for a position as a police officer. Many of these factors, such as the prospective grand juror's county of citizenship or the prospective police officer's score on a civil service vocabulary examination, are also relatively simple, objective factors for the decision maker to weigh. Further, the same set of these factors are applicable in each decision whether to hire an individual for a job or to select an individual to sit on a grand jury. See Castaneda v. Partida, 430 U.S. 482, 484-485 (1977); Washington v. Davis,

supra, 426 U.S. at 232-236. In these contexts, a racially disparate impact evidenced by the decisions may itself hint of purposeful invidious discrimination merely because of the sparsity of alternative explanations.

The situation is starkly different as to decisions whether to sentence a person to death. These decisions are affected by countless legitimate factors, most of which are complex and subjective. Each individual case has its own set of unique legitimate factors. Indeed in each individual case, the capital-sentence decision maker is required to take into account "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978), emphasis added; Eddings

v. Oklahoma, 455 U.S. 104, 111, 113-114 (1982).

It is patent that the specific set of factors legitimately applicable to the capital sentencing decision in one case will not be the same set of factors legitimately applicable to the vast majority of other capital sentencing decisions. Petitioner does not bring to the Court's attention a single Georgia case other than his own in which the decision maker was faced with evidence sufficient to find the defendant guilty beyond a reasonable doubt of killing a police officer to prevent his own arrest for the public-endangering daytime armed robbery the officer caught him committing in a retail store, in which the robbery had been planned, in which the defendant had accomplices, in which the defendant boasted of the killing after his arrest, in which no mitigating evidence

was presented to the penalty decision maker, and in which the defendant had three prior convictions for armed robbery. See McCleskey v. Kemp, supra, 753 F.2d at 882; McCleskey v. Zant, 580 F.Supp. 338, 345-346 (N.D. Ga. 1984). Consequently, in the context of capital sentencing decisions, a racially disparate impact of those decisions does not itself suggest purposeful invidious discrimination because of the veritable ocean of alternative explanations.

Since a bare showing of a racially disparate impact of capital sentencing decisions does not begin to reflect the thousands of unique factors considered by the decision makers in all the cases, it cannot be said that such a disparate impact "bespeaks discrimination." See Hernandez v. Texas, 347 U.S. 475, 482 (1954). Thus, proof of disparate impact

alone cannot suffice to demonstrate purposeful racial discrimination in the imposition of the death penalty. Arlington Heights v. Metropolitan Housing Corp., supra, 429 U.S. at 266.

C. **Petitioner's Showing**

Petitioner's evidence, at most, was nothing more than a showing of disparate impact. The "bottom line" of his argument is that, even when 39 legitimate sentencing factors are taken into account, killers of white victims in Georgia are on an average over 4.3 times more likely to receive a death sentence than similarly situated killers of black victims.[10/] Brief for Petitioner at 55.

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10. According to petitioner, Professors Baldus and Woodworth collected data on over 500 factors. Brief for Petitioner at 53. However, they considered only 39 factors in what they called "their most explanatory model", reflecting a logistic regression analysis. Id. at 55, 80, emphasis added. Although 230 variables

The fact that Professor Baldus considered 39 legitimate sentencing factors does not alter the disparate impact nature of his showing. It is no more suggestive of the conclusion that the race of the victim influenced the entire capital sentencing process in Georgia than it is suggestive of the conclusion that other legitimate factors, somehow associated with the race of the victim, but distinct from the race of the victim, influenced the process. In fact, if any conclusion can be drawn from Professor Baldus' figures it is the latter one. When Professor Baldus first examined Georgia's capital eligible cases and took into

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were considered in another model, reflecting a multiple regression analysis, Professor Baldus apparently was of the opinion that the "most meaningful summary indicators of the magnitude of the racial factors found" were those that he calculated under the logistic regression analysis. Id. at 80.

consideration only the race of the victim, he found that the death sentencing rate in Georgia was nearly 11 times higher in white victim cases than in black victim cases. Id. at 52-53. This disparity plummeted from 11 to 4.3 when only 39 legitimate race-neutral factors were considered. Id. at 55. Thus, it would appear that when only a fraction of the innumerable possible legitimate capital sentencing factors were taken into account, the initial disparity was reduced by more than half. This would suggest that the race of victim disparity in Georgia merely reflects that white victims in Georgia are more likely to be targets of the aggravated type of killings which qualify the killer for the death penalty.

In the enormously complex and subjective context of capital sentencing, this "4.3" disparity based on a mechanical

consideration of only 39 factors is relatively small and does not present a pattern resembling that found in Gomillion or Yick Wo. Accordingly, petitioner did not meet his burden of proof.

II

EACH CAPITAL CASE IS UNIQUE AND THE COMPARISON OF ONE CASE WITH ANOTHER, THROUGH THE USE OF STATISTICAL ANALYSIS, CANNOT REASONABLY BE EXPECTED TO YIELD VALID RESULTS

The defect in petitioner's showing goes beyond his failure to demonstrate a level of disparate impact sufficient to make a prima facie case of purposeful invidious discrimination in the imposition of Georgia's death penalty. Amici curiae urge that, in the unique context of capital sentencing decisions, a generalized statistical showing of disparate impact does not even reliably show disparate impact. While it may be theoretically

possible to reduce capital sentencing decisions to a statistical analysis, in reality no statistical analysis of those decisions will yield a valid result.

As petitioner characterizes it, his argument is at heart simple and direct: "Evidence of racial discrimination that would amply suffice if the stakes were a job promotion, or the selection of a jury, should not be disregarded when the stakes are life and death. Methods of proof and fact finding accepted as necessary in every other area of law should not be jettisoned in this one." Brief for Petitioner, at 31-32.

This contention demonstrates on its face why it is unsound. The methods of proof and factfinding accepted as necessary in other areas of the law are not jettisoned here. No one suggests that the principles established in Yick Wo,

Gomillion, Arlington Heights, and Washington v. Davis, supra (to name just a few pertinent cases) be ignored. Indeed, they are relied upon more strongly than ever. However, this is not a problem of discrimination in employment, housing or jury selection. Statistical analysis of capital cases is almost infinitely more complex than the statistical analysis of a job promotion or jury selection case. Petitioner has failed to meet the challenge of this argument. He masks over the near insuperable difficulties he faces with legal rhetoric which fails to address the problems of a statistical analysis of capital cases. If this were a simple case and the data analyzed by petitioner's experts were limited as it is in other types of discrimination cases (e.g., Castaneda v. Partida, supra, 430 U.S. 482 [jury panel composition]; Teamsters v.

United States, 431 U.S. 324 (1977) [employment discrimination]), the problems we outline below would be considerably less important. But this is not a simple case. As we shall show, there is virtually no hope of success of showing race discrimination through a statistical analysis.

A. Use of Generalized Statistical Studies of Capital Sentencing Decisions Has Been Uniformly Rejected by Lower Courts

Other courts which have addressed the issue of whether such generalized statistical studies as were presented in the instant case can succeed have concluded such studies have virtually no hope of success. Smith v. Balkcom, 660 F.2d 573, as modified 671 F.2d 858, 859-860 (5th Cir. 1982); Spinkellink v. Wainwright, 578 F.2d 582, 614-615 (5th Cir. 1978); Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983); Stephens v.

Kemp, 464 U.S. 1027, 1030, n. 2 (1983) (Powell, J., dissenting). As the Court stated in Smith v. Balkcom, supra, 671 F.2d at 859: "The raw data selected for the statistical study bear no more than a highly attenuated relationship to capital cases actually presented for trial in the state. The leap from that data to the conclusion of discriminatory intent or purpose leaves untouched countless racially neutral variables."

B. **Capital Sentencing Decisions Are Different From Decisions In Other Contexts**

Petitioner's argument that his statistical analysis is only different in degree from statistical analyses in other contexts such as jury panel composition and employment discrimination fails to address and appreciate the difficulties inherent in a statistical analysis of capital cases. Upon reflection, it will

be evident that there are qualitative differences which distinguish statistical analysis of capital cases from all other types of cases considered thus far by the courts.

Focusing first on employment discrimination cases reveals striking differences. In this context, the factors about an employee's background that are relevant to job performance are in general directly comparable across employees. They include education (does the employee have a high school diploma or a college degree), previous relevant job experience (has the employee or applicant any previous secretarial experience; can he/she drive a large tractor-trailer truck), supervisor evaluations (the employee's typing ability is nonexistent, poor, excellent), and the like. A comparison of these factors to the factors pertinent to death penalty

decisions reveals there is no analogue in employment discrimination cases to such factors as the presence of torture in a killing. See McCorquodale v. State, 211 S.E.2d 577, 579-580 (Ga. 1974).

In addition, the decision makers and the decisions in capital sentencing have an entirely different character than in employment cases. In the employment situation, one company hires or promotes employees from a group of potential applicants. In capital cases, there is a separate decision maker (the trier of fact) for each case rather than one decision maker for all cases. In employment decisions, a subset of employees is selected from a pool for a given number of jobs. In capital cases, each case is decided on its own merits. There is no quota. In many hiring and licensing situations, all applicants have to pass

exactly the same objectively scored test. A charge of discrimination in this context can be supported if the test does not meet the standards for job relatedness. There is no analogy to these situations in capital cases.

Other contexts such as whether a constitutionally racial balance has been achieved in the formation of a grand jury panel are even simpler than employment discrimination cases. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972); Castaneda v. Partida, supra. Thus, relatively little statistical data may result in a compelling case. For example, in Alexander, a black defendant was able to show that although 21% of the adult local population was black, only one of 20 persons (5%) on the grand jury panel was black and none of the twelve persons on the grand jury which indicted him was

black. This, together with evidence that the jury commissioners knew the race of all prospective jurors, was sufficient to prove a prima facie case. Clearly, the data in Alexander was reliable and the statistical analysis simple and compelling.

Sentencing a person to death has elements not shared by these other types of decisions. Thus, one cannot expect statistical analyses aimed at detecting racial influences in death sentencing decisions to be the same as those that perform well in analyzing racial influences in other more simple social science contexts.

C. Critical Factors in Capital Sentencing Decisions Cannot Be Accurately and Reliably Measured

This Court has indicated its concern in evaluating the reliability of quantitative evidence. Lockhart v. McCree, ___

U.S. ___, ___; 90 L.Ed.2d 137, 144-147 (1986) [reliability of social science data purporting to show conviction-proneness of juries]; Dothard v. Rawlinson, 433 U.S. 321, 338 (1977) (concurring opinion of Rehnquist, J.) [reliability of statistical data purporting to show job disqualification of males versus females by reason of height and weigh requirements]. The reliability of the quantitative evidence submitted by petitioner in the instant case is open to great doubt.

Petitioner has failed to adequately respond to the issue of how a statistical analysis can accurately and reliably measure such factors as torture, prior criminal record, the circumstances of the crime, the helplessness of the victim(s), the life experience of the defendant, and unusual aggravating factors. For example, it is clearly inadequate to simply

determine that torture was either present or not present because there are varying degrees of torture. How does one compare cases when the criminal records of the defendants are not identical? Is the helplessness of a young brutalized female victim the same as the helplessness of a bound and gagged police officer? How does one compare the age and experience of a 22-year-old hostile, angry young male with the age and experience of a 35-year old, cold, calculating, sadistic middle-aged male? How do unusual aggravating factors enter into the equation? For example, in the facts behind Pulley v. Harris, supra, the defendant coolly finished eating the hamburgers which two teenage boys had been in the process of eating when the defendant kidnapped and murdered them for use of their car in a bank robbery. People v. Harris, 28 Cal.3d 935, 943-945 (1981).

How is such a factor measured? What measurable impact did it have on the jury? More importantly, how is it compared with other unusual but vastly different aggravating factors in other cases?[11/] What of the attitude displayed by a defendant during trial? Evidence of this factor in the record may be sparse if it exists at all. If it does exist, how can it be measured in such a way that it can be compared with evidence of another defendant's attitude in a different case?

The courts have accepted as valid statistical analyses done in jury panel composition and employment discrimination

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11. A crucial case in point for amici is the California case of People v. Jackson, supra, 28 Cal.3d at 282-284, 303. During the course of one of his burglary-murders, Jackson raped his victim -- a 90-year old female -- with a wine bottle. Later, he described his victims to an acquaintance as "'two old bags [who] were a nuisance and . . . got what they deserved.'"

cases but they have not accepted as valid a statistical analysis of death penalty cases which claimed to prove race discrimination in the imposition of the death penalty because of these important distinctions.

D. A Generalized Statistical Analysis of Capital Sentencing Decisions in Georgia Cannot Explain the Reasons Why Petitioner Was Sentenced to Death

Finally, the premise upon which petitioner's analysis is based deliberately ignores what happened in his case. A statistical analysis can never prove directly that race was a factor considered by the jury in petitioner's case. As petitioner's foremost expert, David C. Baldus, has stated in his book on the use of statistics to prove discrimination:

> "The primary limitation of quantitative proof in the discrimination context is its inability to support an inference about the reasons for a particular decision, such as why a certain individual

was hired or fired, or why a particular law was adopted. Statistics can provide powerful insight into general or long-run behavior, but as for a particular decision -- and many cases are concerned with just one decision -- at best it can provide a presumption by inferring from the general to the particular." Baldus and Cole, Statistical Proof of Discrimination, at 5 (1980).

E. Conclusion

Amici is not impugning the role of statistical analyses in the law as a general proposition. After all, this Court has made it "unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. [Citations.]" Teamsters v. United States, supra, 431 U.S. at 339. However, even in the context of employment discrimination, where the number of significant variables operating is limited, this Court recognizes that "statistics are not irrefutable; they come in infinite variety and,

like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See, e.g., Hester v. Southern R. Co., 497 F.2d 1374, 1379-1381 (CA5)." Id. at 340. Our point is that no court has ever validated the use of statistical analyses for the purpose of determining whether jury verdicts of capital cases, which involve hundreds if not thousands of significant variables, are constitutionally defective because the jury allegedly considered race of victim or defendant in arriving at their verdict. Capital cases are qualitatively different from other types of discrimination cases: the number of significant variables operating in this context is exponentially greater than in any context heretofore considered by this Court. For this reason, petitioner's

analysis should be rejected as without merit.

III

PETITIONER'S STATISTICAL ARGUMENT UNDERMINES THE RIGHT TO TRIAL BY JURY AND SUBSTITUTES IN ITS PLACE TRIAL BY STATISTICAL ANALYSIS

Petitioner's position is an attack on the jury system itself.

The right to a jury trial is one of the foremost protections of our legal system. "It is fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 150 (1968). Its lineage can be traced to the time of the Norman Conquest. Walker & Walker, The English Legal System, at 229 (1980). It is a fundamental tenet that a criminal defendant is entitled to a trial by an impartial jury drawn from a representative cross-section of the community. This right is guaranteed by the Sixth Amendment

to the Constitution. Taylor v. Louisiana, 419 U.S. 522, 530 (1975). This right, thus, guarantees a defendant a trial by his peers and, together with other fundamental rights, ensures a fair and just determination of the cause. Duncan v. Louisiana, supra, 391 U.S. at 151-156.

Although juries are generally presumed to follow the law given to them by the court (Abney v. United States, 431 U.S. 651, 665 (1977); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367 (1963)), petitioner's statistical analysis implicitly assumes this presumption to be incorrect or inoperative. Notwithstanding the absence of any jury instruction permitting race to be considered by the jury, petitioner's statistical analysis rests on the conclusion that juries in fact do consider race in determining whether to impose the death penalty.

Petitioner's statistical argument postulates that the death penalty verdicts reached by presumptively lawfully constituted juries, acting pursuant to constitutionally valid laws, are constitutionally invalid because statistically it can be shown that persons who kill white victims are more likely to receive the death penalty than those who kill non-whites.

This argument strikes at the heart of the judicial system. A jury's verdict, based on literally hundreds (perhaps thousands or millions) of individual bits of information, arrived at through the collective reasoning process of twelve separate persons, is reduced to mere statistical data. Petitioner would, in essence, substitute a statistical analysis for the jury's verdict. The end result would be the emasculation of the right to a jury trial.

Petitioner's argument postulates that regardless of the observance of his constitutional rights in the course of a jury or court trial, conducted pursuant to constitutionally valid laws, the verdict is always subject to further statistical analysis. Petitioner would, thus, create a super appellate process whereby after a verdict has been found legally valid on appeal to the highest court of a state, the verdict may nevertheless be tested again by being subjected to a statistical analysis. There is no constitutional basis for such procedure and a hearing aimed at subjecting jury verdict data in capital cases to such analysis is contrary to our system of criminal jurisprudence.

In his concurring opinion in Gregg v. Georgia, supra, 428 U.S. at 226, Justice White disposed of a similar argument:

> "Petitioner has argued, in effect, that no matter how effective the death

penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner."

CONCLUSION

Petitioner's statistical analysis of capital cases and the conclusions he reaches should be rejected. He has failed to prove even a prima facie case of race discrimination in the system. A fortiori he has failed to prove race discrimination by the jury in his case. In the instant case, petitioner has used "statistics as a

drunk man uses a lamp post -- for support and not illumination." Keely v. Westinghouse Electric Corp., 404 F.Supp. 573, 579 (E.D.Mo. 1975).

Petitioner asks this Court to apply a standard for weighing evidence completely out of context. Then he asks this Court not just to accept but to validate a statistical analysis which inherently fails to identify and accurately measure all significant variables operating in capital cases. Finally, he asks this Court to reject his individual sentence of death on the novel theory that it must be infected with race bias because a general statistical analysis suggests race bias in other cases. All of this he asks be done after decisions by the Georgia Supreme Court, various federal courts, and this Court, upholding the jury's sentence. None of these requests have merit. To

validate any of them would be contrary to law previously laid down by this Court. To grant them all will be tantamount to rejecting one of the principal elements of our judicial system: trial by jury. Surely, such request must be denied as without any foundation in the law. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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